

Iowa Department of Inspections and Appeals
Administrative Hearings Division

Jeffrey Vollmer
d/b/a Best Choice Windows, Inc.
13418 L Street
Omaha, Nebraska 68137,

DIA Case No. 23IWDM0013

Appellant,

**ADMINISTRATIVE LAW JUDGE
DECISION**

v.

Iowa Workforce Development,

Respondent.

STATEMENT OF THE CASE

Iowa Workforce Development (“IWD”) completed an investigation and determined that an employer-employee relationship existed between Best Choice Windows (“BCW”) and nine of its workers. After BCW owner Jeffrey Vollmer (“Vollmer”) appealed, IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings, to schedule a contested case hearing. A contested case hearing was held on December 19, 2022 by telephone conference call. Vollmer, represented by CPA Marcus Augustin, appeared and testified. Jeffrey Koncsol represented IWD. Field Auditor Deborah Pendleton appeared and testified on behalf of IWD. Exhibits submitted by IWD and the Appellant were admitted into the record. The matter is fully submitted.

ISSUE

Whether IWD properly determined that an employer-employee relationship existed between BCW and nine workers.

FINDINGS OF FACT

On August 16, 2022, IWD field auditor Deborah Pendleton completed an audit of BCW finding nine workers were misclassified by BCW as independent contractors when they should be considered employees. IWD p. 10. Specifically, Eric Halligan, Barry Duncan, Heath Johnson, James Ross, Matthew Daniel, Michael Scott, Scott Broshar, Susan Thomas, and Wesley Morrison were found to have been misclassified. Id. The notice of decision cited the following factors for the determination:

- The workers performed duties in the regular service of the employer
- The work was performed under the name of the employer
- The service provided by the workers was an integral part of the business

- The workers could end the relationship without incurring liability
- The employer could fire the workers without incurring liability
- The worker had a continuing relationship with the employer
- The workers were paid on a weekly basis
- The employer had direction and control over the workers
- The workers did not have a contractor's registration
- The workers did not invoice for their work
- The workers did not have business insurance or worker's compensation insurance

Id. IWD provided a synopsis for their decision on each individual at issue. IWD ps. 19-30. However, for sake of some brevity, the employees at issue, with the exception of Susan Thomas for which there is no dispute she is an employee, can be divided into three categories. There are salespeople, installers, and operations managers.

Salespeople

Salespeople were paid 100% on commission. Their commission would range from 3% to 10%, depending on the price of the window sold. See BCW ps. 8-14. However, until salespeople started earning commissions, BCW would float salespeople money that would be paid back with later-earned commissions. For each job a "window commission sheet" would be completed but these forms seem less like invoices and more of a calculation sheet for BCW to determine commissions on each job. See id.

BCW would pay for advertising and any leads from that advertising were assigned to a salesperson. Salespeople would indicate their availability by email to BCW and based on their statement of availability, they would be sent Google calendar invites to follow up on the leads and close the sale. Salespeople used their personal vehicles and paid for their own gas in responding to leads provided by BCW. BCW provided salespeople sales materials and samples that they could use in selling BCW products. Salespeople represented themselves as salespeople with and for BCW and exclusively sold BCW products. Salespeople had the ability to purchase and wear BCW merchandise on their sales calls.

Salespeople signed an "independent contractor agreement" that included provisions regarding BCW's "right to immediately terminate" the employment relationship for "cause," which was further defined. BCW p. 55. Further the agreement contained non-interference and restrictive covenant provisions; which essentially act as non-compete agreements. BCW ps. 56-57. This appears to be in stark contrast to Vollmer's testimony, which indicated salespeople were free to work other sales jobs, including for competitors, in addition to their work with BCW.

Eric Halligan: Eric Halligan worked for BCW as a salesperson from at least February 2018 through February 2019. IWD ps. 21-22. Halligan was paid wages by BCW almost

every two weeks besides a period around the Christmas and New Year holidays. Id. Halligan did not have any contractor registration, no advertising of his services to the general public, and did not have general business insurance. Id. There is not sufficient evidence in the record that Halligan performed sales work for any other company besides BCW.

Scott Broshar: Broshar worked for BCW as a salesperson. He only was paid six times between December 15, 2017 and March 23, 2018. IWD p. 30. However, Broshar's first four checks were paid every two weeks and were even numbers; [REDACTED] or [REDACTED]. Id. His last two checks were basically the same amount, just under [REDACTED]. Id. Broshar did not have any contractor registration, no advertising of his services to the general public, and did not have general business insurance. Id. There is not sufficient evidence in the record that Broshar performed sales work for any other company besides BCW. Based on his payment records, it seems likely that Broshar was floated money at the beginning of his employment but did stay employed long enough, for whatever reason, to earn regular commissions.

Installers

Installers were not provided any training or direction on how to install windows. Installers were hired based on their already established competency to install windows. Installers indicated the prior week what their availability would be for the following week. Based on that statement of availability, installers would be sent Google calendar invites for installation jobs. It was expected that if an installer indicated that they were available, they would perform the installation as assigned. Installers were paid per window installed. To get paid, an installer would complete an invoice showing the specific acts of labor they performed and would then submit that to BCW to be paid. See BCW p. 23.

Installers had to provide their own equipment such as ladders and levels and their own materials such as caulk, shims, and putty for each job. Only the window to be installed was provided by BCW. Installers maintained their own work trucks and were responsible for their own transportation to jobs. Installers were required to maintain their own business insurance and list BCW, and typically any other company they provide work for, on their policy. If the installer causes damage to a customer's property or the customer requires any other compensation due to an act of the installer; the installer would be required to file a claim on their own insurance or pay the damages out of pocket. Conceivably, an installer could lose money on a project.

Installers signed an "independent contractor agreement" that included provisions regarding BCW's "right to immediately terminate" the employment relationship for "cause," which was further defined. IWD p. 68. Further the agreement contained non-interference and restrictive covenant provisions, which essentially act as non-compete agreements. IWD ps. 69-70. Vollmer testified that his installers did work for other

companies including some doing siding work. While some of this outside employment still seems to contradict the non-compete provisions in the installer's contract, window installers performing installation work for companies outside of BCW seems more credible than that of the salespeople.

Barry Duncan: In 2018, Barry Duncan was paid weekly between October 28 and November 30. IWD p. 20. The payment amounts varied widely from [REDACTED] to [REDACTED]. Id. Duncan was paid by the job and for the specific acts of labor he performed. Id. Duncan maintained his own business insurance though BCW was the certificate holder. Id., BCW p. 16. Despite the assertion on the IWD synopsis, Duncan did invoice his work and indicated each specific task of labor he completed. See BCW ps. 23-28. Duncan would turn those invoices into BCW and was paid at the end of the week for the specific acts of labor he performed. See BCW p. 22. Duncan was reimbursed \$13.77 in office supplies on November 9, 2018. IWD p. 50.

Duncan completed an IWD questionnaire as part of the investigation. Duncan indicated that when he performs installations, he does so in his name. IWD p. 61. Duncan also indicated that he provides equipment, supplies, materials, tools, and his vehicle. IWD p. 62. Duncan noted that he is not eligible for benefits. IWD p. 63. While Duncan indicated that he did not work for anyone else during his time working for BCW; he did note that nothing prevented him from working for other contractors. Id.

Following this questionnaire, Duncan was emailed some additional questions. IWD p. 65. In response to the emailed questions, Duncan indicated that he does not hire assistants but would have to pay them personally if he did. Id. Duncan also indicated that he has to complete a report that he turns into BCW to get paid. Id.

Wesley Morrison: Wesley Morrison worked as an installer in 2019. IWD p. 30. Between May 31, 2019 and July 26, 2019 Morrison was paid almost every week. Id. Payment amounts varied from [REDACTED] to [REDACTED]. Id. Morrison was paid by the job and for the specific acts of labor he performed. IWD p. 20. Morrison maintained his own business insurance. Id. While IWD indicated that installers did not issue invoices, it seems very likely Morrison completed invoices that he turned into BCW to get paid, similar to Duncan. See BCW ps. 23-28.

Matthew Daniel: Daniel only received three paychecks; July 30, 2021, August 6, 2021, and September 23, 2021, as an installer for BCW. IWD p. 28. The payments ranged from [REDACTED] to [REDACTED]. Id. Daniel was paid by the job and for the specific acts of labor he performed. IWD p. 20. Daniel maintained his own business insurance. Id. While IWD indicated that installers did not issue invoices, it seems very likely Daniel completed invoices that he turned into BCW to get paid, similar to Duncan. See BCW ps. 23-28.

Operations Managers

Operations managers were salespeople or installers who were compensated a base, uniform, amount in addition to their sales commissions or install fees. Operations managers would help “man the office” as the company really only had Vollmer as owner and a secretary. Sometimes operations managers were required to answer the company phone if the secretary was out. They would answer the phone as BCW and not in their own name. Operations managers were also required to respond to customer concerns on behalf of BCW. These operations managers would go to customer homes and “try to put out fires” on behalf of BCW. If the operations manager could fix the issue themselves, they would. Otherwise they would schedule an installer to perform any needed fix. When responding to these customer calls, they would represent themselves as BCW and not themselves individually.

Heath Johnson: Johnson worked as a salesperson in addition to his duties as an operations manager. During the period in question, Johnson was paid weekly from January 6, 2017 through June 18, 2018. IWD p. 22. While pay ranged from [REDACTED] to [REDACTED], thirteen of the payments were for exactly [REDACTED]. Id. On the general ledger it shows that Johnson was paid [REDACTED] every other week ([REDACTED]0 per week) for his duties as operations manager between January 6, 2017 and May 12, 2017. IWD p. 51. There is no evidence that Johnson held his sales services to the public. IWD p. 22. Johnson did not have business insurance. Id. Johnson was reimbursed \$9.85 for office supplies on March 10, 2017. IWD p. 50.

James Ross: Ross worked as an installer and sales person in addition to his duties as an operations manager. IWD p. 47. During the period in question, Johnson was paid weekly from January 4, 2017 through December 31, 2021. IWD ps. 23-28. His weekly pay ranged from [REDACTED] to [REDACTED]. Id. On the general ledger it shows that Ross earned \$500 every week for his duties as operations manager between August 6, 2021 and December 31, 2021. IWD p. 51. There is no evidence that Ross held his installation or sales services to the public. IWD p. 22. Ross did maintain private business insurance. Id. Ross was reimbursed by BCW six times for office supplies between 2017 and 2021. IWD p. 50.

Michael Scott: Scott worked as a salesperson in addition to his duties as an operations manager. During the period in question, Johnson was paid basically every week from May 23, 2017 through March 9, 2018. IWD ps. 28-29. His pay ranged from [REDACTED] to \$ [REDACTED]. Id. On the general ledger it shows that Johnson was paid [REDACTED] twenty-seven times, in addition to his commissions, between June 2, 2017 and December 1, 2017. IWD p. 51. There is no evidence that Johnson held his sales services to the public. IWD p. 29. Johnson did not have business insurance. Id.

CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.¹ IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.² IWD has adopted rules found at 871 IAC chapter 23.

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.³ Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.⁴ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.⁵ If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.⁶

An employer is defined as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid wages for service in employment."⁷ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁸ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁹ Employment includes service performed by "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."¹⁰

Whether a person is an independent contractor or an employee is a "factual determination based on the nature of the working relationship and many other circumstances, not necessarily on any label used to identify the parties in the contract."¹¹ In other words, if the relationship of employer and employee exists, the parties' designation or description of the worker as an independent contractor is immaterial and of no consequence.

The right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor in the

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ 871 IAC 23.19(6).

⁵ Iowa Code § 96.19(18)*f*, *Id.* 22.7(3).

⁶ 871 IAC 22.19(7).

⁷ Iowa Code § 96.19(16)*a*.

⁸ *Id.* § 96.19(17).

⁹ *Id.* § 96.19(18)*a*.

¹⁰ *Id.* § 96.19(18)*a*(2).

¹¹ Pennsylvania Life Ins. Co. v. Simoni, 641 N.W.2d 807, 813 (Iowa 2002) (quoting Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684 n. 2 (Iowa 2001)).

unemployment context.¹² Whether an employer-employee relationship exists under the usual common law rules is determined based upon an analysis of the individual facts in each case.¹³ IWD has also adopted a number of rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁴

Under IWD's rules,

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.¹⁵

The right to discharge or terminate a relationship is "an important factor indicating that the person possessing that right is an employer."¹⁶ If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹⁷

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.¹⁸ "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor."¹⁹

Another factor includes the nature of the worker's contract for the performance of a certain type, kind or piece of work at a fixed price.²⁰ Generally an employee performs the work continuously and his or her labor is primarily purchased, whereas an independent contractor undertakes the performance of a specific job.²¹ An employee is typically paid a fixed wage on a weekly or hourly basis, whereas an independent

¹² Gaffney v. Dep't of Employ. Servs., 540 N.W.2d 430, 434 (Iowa 1995).

¹³ 871 IAC 23.19(6).

¹⁴ *Id.* 23.19.

¹⁵ *Id.* 23.19(1).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 23.19(2).

²¹ *Id.*

contractor is typically paid one sum for the entire work, whether it is paid in a lump sum or installments.²²

Independent contractors can make a profit or loss and are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed.²³ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁴ Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²⁵

An independent contractor follows a distinct trade, occupation, business or profession in which the worker offers his or her services to the public to be performed without the control of those seeking the benefit of the worker's training or experience.²⁶ Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.²⁷ Professional employees who perform services for another individual or business are covered employees.²⁸

ANALYSIS

As noted above, services performed by an individual for remuneration are presumed to be employment, unless proven otherwise and the business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96. In this case, most of the workers should be considered employees, outside several exceptions.

Susan Thomas

It is undisputed that Susan Thomas should be considered an employee of BCW.

Heath Johnson, Michael Scott, and James Ross

These three individuals are listed as and receive pay as "operations managers." IWD p. 51. These individuals were paid a flat \$500 per week for their services as operations managers, in addition to their pay as a salesperson or window installer. *Id.* As operations managers, they would help "man the office" and answer the company

²² *Id.* 23.19(4).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(5).

²⁶ *Id.* 23.19(2).

²⁷ *Id.* 23.19(1).

²⁸ *Id.*

phones as needed. They would answer the phone as BCW and not in their individual names or in their individual capacities.

If a customer complained, it was the operations manager's job to "put the fire out" on behalf of BCW. They would respond to customer calls and see what work needed to be done. When responding to customer calls, they acted as agents of BCW and not in their individual capacities or as independent contractors. If they could fix the issue, they would do so on site. Otherwise, they would arrange a service call for whatever issue needed to be fixed. As operations managers, they acted as agents and the faces of BCW to its customers.

As managers they appear to have a level of control over BCW operations that would not be found in an independent contractor relationship. Similarly, BCW had more control over them in regards to duties assigned and hours worked. Operations managers were paid a uniform amount at uniform times for their services in this role. This type of remuneration would not be typical in an independent contractor relationship. While operations managers maintained their other work with BCW as salespeople or installers; the operations manager work alone qualifies them as employees.

Eric Halligan and Scott Broshar

These two individuals worked as salespeople for BCW. Their pay was based one hundred percent on commission. However, BCW did float them a certain amount of pay in the beginning of their employment that would be repaid from future commissions. Floating money would not be found in an independent contractor relationship. Leads would come in from various modes of advertising by BCW and the salespeople were assigned to follow up on the leads provided by BCW and close the sales. If salespeople indicated that they were available certain days on their submitted schedules, there was an expectation that they carry out the leads that were assigned to them. Neither individual appeared to use assistants in discharging their work.

Salespeople would use their own vehicles and gas to visit potential clients' homes. However, the sales people would represent themselves to customers as agents of BCW and were provided BCW sales materials to sell BCW products. There is no indication that these salespeople offered their services to the public through advertising or any other means. Neither individual had an unemployment insurance account or any other official registration. Neither individual maintained individual business insurance. These individuals did not invoice BCW for their work.

While Vollmer testified that these individuals were free to work sales jobs at other companies, including competitors, the mandatory signing of the employment agreement, which included an effective non-compete clause seems to question that. In any event, while possible if not likely that these individuals performed side-jobs outside BCW; that does not change that there was an employee/employer relationship with

BCW. Halligan was paid basically weekly from February 9, 2018 through February 8, 2019 for a total of [REDACTED]. This level of continued and sustained wages and employment indicates an employer, employee relationship. Broshar's tenure was shorter but was still paid nearly weekly during his employment. Based on all these facts; BCW has failed to meet their burden to show these individuals were not employees.

Matthew Daniel, Wesley Morrison, and Barry Duncan

These three individuals served as installers for BCW. Their paychecks varied greatly as their compensation was based solely on the actual amount of installation work they performed. All three of these installers maintained their own business insurance. Installers did not maintain an office presence at BCW. Installers provided their own equipment and materials to install the windows. BCW would only provide the window to be installed, the installers would provide everything else including ladders, caulk, levels, etc. Installers were not trained by BCW or required to install windows any specific way; they were allowed to rely on their own training and experience.

Installers would complete invoices for each job that showed the specific installation work they performed and BCW would pay them based on that invoice. It appears likely that these installers performed or were at least allowed to perform installation work for other companies while maintaining a working relationship with BCW. Duncan's questionnaire responses indicate that installers could have assistants but they would be responsible for paying that assistant out of their defined labor fees from BCW. Installers were able to tell BCW when they wanted to work and conversely did not want to be work and they were provided jobs based on their provided schedule. These three installers did not carry out any managerial work for BCW.

Conceivably, installers could lose money on a job if they caused a problem that had to be reimbursed by them out of pocket or required a claim to be filed against their business insurance. While there was a contract signed that required certain behavior, such requirements are not unusual in a contractor / independent contractor relationship. While the installer agreement appears to contain a non-compete clause, the bulk of the information available indicates that these three installers worked in an independent contractor relationship. BCW has shown that these employees should be classified as independent contractors.

Conclusion

The nature of the work of the individuals acting as salespeople and operations managers indicates an employee, employer relationship. The level of control by and representation of BCW by these individuals is more than what would be found in an independent contractor relationship. Labeling them independent contractors in their employment agreement is not sufficient to create an independent contractor

relationship. BCW has failed to show sufficient evidence that these individuals should not be classified as employees.

However, BCW has shown sufficient evidence that the installers, who did not also act as operations managers, were independent contractors. There was not the level of affiliation with or control by BCW that the salespeople or operations managers had. The installers carried their own business insurance. The installers provided their own equipment and materials. The installers invoiced for their work. The installers were paid by the job. Installers were not required to perform their duties in any specific way. The installers were free to work as much or as little as they wanted. It is also likely that installers performed similar work for other companies while also performing work for BCW. They should be considered independent contractors.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between BCW and Eric Halligan, Heath Johnson, James Ross, Michael Scott, Scott Broshar, and Susan Thomas. Iowa Workforce Development's decision regarding Barry Duncan, Matthew Daniel, and Wesley Morrison is reversed as these individuals should be classified as independent contractors.

APPEAL RIGHTS

This decision constitutes final agency action. Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing. Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing.²⁹

CC:

Jeffrey Vollmer d/b/a Best Choice Windows, Inc.; jeff.vollmer@abcwin.com (by email and mail)

Marcus L. Augustin, PO Box 613, Osceola, NE 68651; marcusaugustincpa@gmail.com (by mail and email)

Abdullah Muhammad, IWD Abdullah.Muhammad@iwd.iowa.gov (by email)

Deborah Pendleton, IWD Lisa.Gaeta@iwd.iowa.gov (by AEDMS)

Barbara Corson, IWD Barbara.Corson@iwd.iowa.gov (by AEDMS)

Jeffrey Koncsol, IWD Jeffrey.Koncsol@iwd.iowa.gov (by AEDMS)

²⁹ 871 IAC 26.17(5)

Case Title: BEST CHOICE WINDOWS, INC. V. IOWA WORKFORCE
DEVELOPMENT
Case Number: 23IWDM0013
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to be 'TA', with a horizontal line extending to the right.

Thomas Augustine, Administrative Law Judge